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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE STATE OF WYOMING,

Petitioner,

v.

SANDRA HOUGHTON,

Respondent.

On Petition For Writ Of Certiorari To The Wyoming Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the "automobile exception" to the Fourth Amendment's warrant requirement allows police to conduct a warrantless search of a passenger's personal belongings – in this case a purse – located inside the passenger compartment of a vehicle lawfully stopped for traffic violations, when police have developed probable cause to search the vehicle generally for controlled substances but have no probable cause specific to the purse or passenger.

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PETITION FOR WRIT OF CERTIORARI

The State of Wyoming, as petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Wyoming Supreme Court entered on April 3, 1998, a timely petition for rehearing having been denied on April 28, 1998. Petitioner further suggests that this Court dispose of the case with a summary disposition on the merits. Sup. Ct. R. 16.1.

OPINION BELOW

The opinion of the Wyoming Supreme Court is reported at 956 P.2d 363 (Wyo. 1998) and is reproduced in the Appendix hereto, pages App. 1-25. The court's order denying rehearing is reproduced in the Appendix, page App. 26.

JURISDICTION

The judgment of the Wyoming Supreme Court was entered on April 3, 1998 and its order denying a petition for rehearing was entered April 28, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In the early morning hours of July 23, 1995, officer Delane Baldwin of the Wyoming Highway Patrol conducted a traffic stop on a vehicle traveling east on Interstate 25 in Natrona County. Officer Baldwin observed that the car was speeding and had a burned out brake light. After stopping the car, a 1977 Cadillac, officer Baldwin contacted the driver, David Young. There were two female passengers in the car, one of whom was the respondent, Sandra Houghton. All the occupants were on the front seat, with Ms. Houghton located at the end next to the passenger door. (Trial Trans. Vol. I, pp. 59-63, 66, 90).

Officer Baldwin asked Mr. Young for his driver's license, registration and insurance certificate. At this point, the officer noticed a hypodermic syringe plainly visible in Mr. Young's left front shirt pocket. Officer Baldwin informed Mr. Young that he had seen the syringe and was going to retrieve his gloves from the patrol car. Upon his return, he instructed Mr. Young to get out and place the syringe on the hood of the car, which he did. In response to a question, Mr. Young stated that he used the syringe to take drugs. (*Id.* at 63-66).

Two fellow officers then removed the passengers from the vehicle and patted them down for weapons. Ms. Houghton voluntarily left her purse in the car when she exited; she was not told to leave it there. She verbally identified herself as "Sandra James" and claimed she had no identification. (*Id.* at 66-69).

Officer Baldwin then began a search of the passenger compartment for drugs, based on the syringe and Mr. Young's statement that he used it to take drugs. The officer found a closed lady's cloth purse on the middle of the back seat and removed a wallet from it. The wallet contained respondent's photo driver's license, identifying her as Sandra K. Houghton. When officer Baldwin asked her why she gave a false name, Ms. Houghton replied it was "in case things went bad." (*Id.* at 68-71).

Officer Baldwin then removed a brown bag from the cloth purse. Opening the bag, the officer found a syringe containing approximately 60 cc's of liquid that proved to be methamphetamine. Looking further, officer Baldwin found more syringes, razor blades and other drug paraphernalia inside the brown bag. The officer then looked at Ms. Houghton's arms, finding fresh needle track marks. At that point, officer Baldwin arrested respondent. (*Id.* at 75-77, 110-12).

Searching further in the purse, the officer found a smaller black bag containing numerous drug-related items, including syringes, spoons and razor blades. (*Id.* at 78). In all, three items inside the purse (two syringes and a vial) were found to contain methamphetamine or methamphetamine residue. (*Id.* at 111-13). During the search, Ms. Houghton admitted the purse was hers but selectively

denied ownership of some of the items pulled from the purse. (Trans. of Hrg. on Motion to Suppress held 9/27/95, p. 6). The only person arrested or charged in this incident was the respondent. (Trial Trans. Vol. I, p. 98).

Ms. Houghton was charged in state district court with possession of methamphetamine in a liquid amount greater than three-tenths of a gram, a felony. Wyo. Stat. § 35-7-1031(c)(iii). Prior to trial, she filed a motion to suppress all evidence seized in the search of the car, claiming, *inter alia*, that the search violated the Fourth and Fourteenth Amendments. A hearing was held on the motion. Subsequently, a decision letter and order were issued denying the motion. The district judge ruled that when an officer has generalized probable cause to believe contraband is somewhere in a car, he may search the car and containers within the car, including a passenger's purse. (Clerk of Court's Pleadings Vol. I, pp. 62, 68, 77, 98; Trans. of Hrg. on Motion to Suppress held 9/27/95). The evidence was duly admitted at trial over the objection of defense counsel. (Trial Trans. Vol. I, p. 72). Ms. Houghton was convicted by the jury as charged. (Clerk of Court's Pleadings Vol. I, pp. 144-45).

Respondent appealed her conviction to the Wyoming Supreme Court,[1] claiming error in the denial of her motion to suppress.[2] She conceded on appeal there was

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[1] There is no intermediate court of appeals in Wyoming for review of cases originating in the state district courts.

[2] Although respondent's claim of error in the trial court and Wyoming Supreme Court relied on both the Fourth Amendment and its state constitutional counterpart, Wyo. Const. art. 1, § 4, she failed to adequately develop her state

probable cause to search the car for drugs but maintained that in the absence of probable cause specific to her or her purse, the search violated her reasonable expectation of privacy in her personal belongings. (App. 6). The Wyoming Supreme Court framed the issue to be "whether the personal belongings of a passenger may be searched under the "automobile exception" when probable cause exists to search the automobile, but there is no probable cause to believe the passenger is involved in criminal activity." (App. 5-6).

The court's analysis began with this Court's pronouncements on the scope of a warrantless search based on probable cause, recognizing that "[t]he scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." *United States v. Ross*, 456 U.S. 798, 823, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982). The court further acknowledged that, according to *Ross*, 456 U.S. at 821, 102 S.Ct. at 2171, "[a] warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search." (App. 7).

While seeming to accept the proposition that the scope of a warrantless search based on probable cause is the same as a search pursuant to a warrant, and that the

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constitutional argument on appeal. *Gronski v. State*, 910 P.2d 561, 566 (Wyo. 1996). Thus, the Wyoming Supreme Court considered the issue solely under Fourth Amendment standards. (App. 6, n. 2).

officer here had probable cause to search the car generally for contraband that was capable of being concealed in Ms. Houghton's purse, the court identified the "problem" to be that there was no specific probable cause to believe the purse contained contraband. At this point, the court declared:

> Therefore, the question is, if a warrant had issued on the basis that *Young* [the driver] held drugs in his car, whether the search of the personal effects of a *passenger or guest* would be within the scope of the warrant. (emphasis in original).

(App. 8).

The court's use of the word "guest" in the passage above to describe Ms. Houghton's status was not accidental, for on this single word the court's analysis shifted from car searches to searches of the person and personal effects of *guests on fixed premises*. After noting the holding in *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (warrant to search premises of a tavern and the person of the bartender does not permit pat down search of a patron), the court discussed the three tests courts have employed for determining when a premises search warrant authorizes a search of a visitor's personal items. Weighing the relative merits of the three tests,[3] the court adopted the "notice" test for *both* searches of a visitor's

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[3] The three tests are the physical proximity test, the relationship test and the notice test. *See, generally*, 2 Wayne R. LaFave, *Search and Seizure*, § 4.10(b) (3rd ed. 1996).

personal effects under a premises search warrant,[4] and for the search of a motor vehicle passenger's personal effects under the Fourth Amendment's automobile exception. (App. 15, 17).

Under the notice test, an officer may assume that all containers on the premises may be searched unless he knows or should know that a container belongs to someone not covered in the warrant. If he knows or should know the container belongs to a visitor, he may search it only if there is independent probable cause to do so, or if someone on the premises had an opportunity to conceal contraband in the container immediately prior to execution of the search warrant. *See State v. Thomas*, 818 S.W.2d 350, 359 (Tenn.Crim.App. 1991).

Applying the notice test to the facts of this case, the court concluded the search violated the Fourth Amendment:

> Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection. Here, the officers knew or should have known that the purse did not belong to the driver, but

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[4] Petitioner is not challenging herein that part of the Wyoming Supreme Court's holding that applies to the search of a visitor's personal effects under a premises search warrant.

> to one of the passengers. Since there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse, the search was unreasonable and in violation of the Fourth Amendment right to be free from such governmental intrusion.

(App. 21-22).

Two of the five Justices of the Wyoming Supreme Court dissented from this ruling. The State of Wyoming filed a timely petition for rehearing which was denied by the court on April 28, 1998, with the same two Justices dissenting from the denial of rehearing. (App. 22, 26).

REASONS FOR GRANTING THE WRIT

I

The Wyoming Supreme Court's decision is plainly contrary to this Court's "automobile exception" doctrine as developed in *Carroll*, *Ross* and *Acevedo*.

In holding that probable cause to search a car generally for contraband is insufficient to search the personal belongings of a passenger for whom there is no individualized probable cause, the Wyoming Supreme Court has effectively repudiated this Court's "automobile exception" to the Fourth Amendment's warrant requirement. Henceforth in Wyoming, the law of automobile searches in cases involving one or more passengers (an obviously common situation) will be governed by rules heretofore applicable only to a constitutionally distinct situation – the search of personal belongings of visitors to fixed premises. The court erred by not recognizing the proper

extent of an officer's authority to conduct a warrantless search of an automobile after probable cause has been established.

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), this Court established the automobile exception to the general requirement that a warrant be obtained to conduct a search. Under *Carroll*, it is permissible to conduct a warrantless search of an automobile when there is probable cause to believe the vehicle contains contraband. The exception to the warrant requirement arises here because of the exigency created by the mobility of the vehicle and its likely disappearance. In later decisions, distinctions were made between probable cause to search a vehicle generally and probable cause to search only a particular container inside of a vehicle. In the latter case, where the probable cause extends only to the container and not the entire vehicle, it was initially held that the automobile exception did not apply and a warrant must be obtained to search the container. *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

Currently, the proper extent of searches under the automobile exception is the product of two cases, *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), and *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). In *Ross*, the question presented was:

> the extent to which police officers – who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it – may conduct

> a probing search of compartments and containers within the vehicle whose contents are not in plain view.

Ross, 456 U.S. at 800, 102 S.Ct. at 2160. This Court held unequivocally and without qualification that:

> the scope of the warrantless search authorized by that [automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, *it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.* (emphasis added).

Ross, 456 U.S. at 825, 102 S.Ct. at 2173.

Subsequently, in *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), the Court revisited *Chadwick/Sanders* by asking whether police may conduct a warrantless search of a bag in the trunk of a car where they had specific probable cause to search the bag but not the rest of the car. In this situation, the *Chadwick/Sanders* rule required that a warrant be obtained before searching the bag because the probable cause was specific to the bag and did not extend generally to the vehicle. Noting the confusion created by the "dual regimes for automobile searches" under *Chadwick/Sanders* and *Ross*, the Court eliminated the warrant requirement for containers where police have probable cause specific to the container but not probable cause to search the vehicle generally:

> We therefore interpret Carroll as providing one rule to govern all automobile searches. The

> police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

Acevedo, 500 U.S. at 580, 111 S.Ct. at 1991. While so holding, the Court maintained the narrow principle that probable cause limited to a particular container in a car does not justify a search of the entire vehicle. *Id.*

The Wyoming Supreme Court gave only cursory attention to the fact that this case involves an automobile search. It failed to recognize that an automobile passenger has a lesser expectation of privacy than a visitor to fixed premises, and likewise, the passenger's personal effects enjoy a reduced measure of freedom from governmental intrusion. Under the automobile exception, as long as the personal effects of a passenger are found within the car and may hold the object of the search, *Ross* allows them to be searched by virtue of their presence in the car. *Ross* made no suggestion that once probable cause to search a vehicle is established, only portions of the vehicle or some of the containers therein may be searched. Quite to the contrary, *Ross* established a comprehensive rule to govern all situations.

The court's application of the law regarding searches of fixed premises to a case involving the automobile exception appears unprecedented. As this Court has made clear, the search of an automobile moving down a highway is constitutionally distinguishable from the search of fixed premises. The inherent mobility of automobiles creates exigent circumstances, *Chambers v. Maroney*, 399 U.S. 42, 50-51, 90 S.Ct. 1975, 1980-81, 26 L.Ed.2d 419 (1970), and the pervasive governmental regulation of

vehicles traveling on the highways creates a lesser expectation of privacy in the vehicle's contents. *California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 2069-70, 85 L.Ed.2d 406 (1985).

Other courts that have considered this issue have not resorted to legal principles governing fixed premises, but have correctly recognized that *Ross* controls. In *People v. McMillon*, 892 P.2d 879 (Colo. 1995), a case remarkably similar to this one, a police officer lawfully stopped a vehicle for a traffic offense. After determining the driver's identity, the officer arrested him on an outstanding warrant related to drugs. He then directed the passenger, McMillon, to step out of the vehicle. She did so, leaving her closed purse behind on the seat. The officer then observed a syringe in plain view inside the car. This observation, together with the driver's drug history and denial that anyone was diabetic, prompted a search of the car's interior. The officer searched McMillon's purse and found cocaine.

The Colorado Supreme Court ruled that the officer had probable cause to perform a general search of the car for contraband, and that neither *Ross* nor *Acevedo* required a separate probable cause determination for the passenger's purse. The search of the purse was proper irrespective of whether the officer knew or should have known that it belonged to McMillon. As an alternative ground for sustaining the search, the court held that it was a proper search incident to arrest under *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), even though the purse belonged to a passenger who was not subject to the arrest. The same result was reached by the court in *People v. Moore*, 900 P.2d 66 (Colo. 1995),

where, after a traffic stop during which the officer developed probable cause to search the car generally for drugs, it was held that the officer could properly search a passenger's wallet found under a seat.

Similar applications of *Ross* to the search of a passenger's personal effects, after developing probable cause to search the vehicle generally, can readily be found. *See, e.g., State v. Fix*, 730 P.2d 601, 603-04 (Or.App. 1986) (search of passenger's purse upheld when there was probable cause to believe truck held evidence of an earlier crime, citing *State v. Brown*, 721 P.2d 1357 (Or. 1986), and *State v. Bennett*, 721 P.2d 1375 (Or. 1986)); *United States v. Crotinger*, 928 F.2d 203, 205-06 (6th Cir. 1991) (automobile exception permitted warrantless probable cause search of passenger's suitcases in trunk); *United States v. Critton*, 43 F.3d 1089, 1094-95 (6th Cir.), *cert. denied*, 514 U.S. 1121, 115 S.Ct. 1987, 131 L.Ed.2d 873 (1995) (even if passenger had requisite expectation of privacy in blue bag, probable cause to search vehicle extended to the bag).

Under *Ross*, the scope of the warrantless search at issue here is the same as one that would have been authorized by a warrant. The Wyoming Supreme Court reasoned that the scope of a warrant to search Young's car in this case would not have extended to the purse Ms. Houghton left in the car. This erroneous conclusion was reached only by giving Ms. Houghton the status of a visitor to fixed premises. If a warrant had issued to search Young's car for drugs, it clearly would have extended to any purse found inside it, and no additional probable cause or second warrant would have been needed.

In *United States v. Kralik*, 611 F.2d 343 (10th Cir. 1979), *cert. denied*, 445 U.S. 953, 100 S.Ct. 1603, 63 L.Ed.2d 788 (1980), a warrant was obtained to search a vehicle for weapons, including a sawed off shotgun belonging to Kralik. At the time the car was stopped and seized, it was being operated by another person and Kralik was a passenger. A search of Kralik's suitcase in the trunk revealed the shotgun. Relying on *Ybarra v. Illinois*, *supra*, Kralik contended that the search warrant did not extend to his suitcase and that a second warrant was needed to search it.

The court of appeals disagreed, reasoning that when a search warrant covers the primary container (the car), additional warrants are not required for the smaller containers inside. Considering the search warrant at issue in *Ybarra*, which did not extend to patrons on the premises, the court said, "[w]e do not equate the search of a person unnamed in a warrant with the search of a described automobile for a specified item." 611 F.2d at 345. *Accord*, *United States v. DeSimone*, 660 F.2d 532, 542 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982) (valid warrant to search one person's car permitted search of another person's suitcase found therein without need for an additional warrant); *United States v. Grandstaff*, 813 F.2d 1353, 1358-59 (9th Cir.), *cert. denied*, 484 U.S. 837, 108 S.Ct. 119, 98 L.Ed.2d 78 (1987) (warrant to search vehicle authorizes search of any luggage therein that might contain contraband listed in warrant); *United States v. Calarco*, 668 F.2d 920, 921 (6th Cir. 1982) (warrant to search car authorized search of objects found within car); *United States v. Callison*, 577 F.2d 53, 55 (8th Cir.), *cert. denied*, 439 U.S. 873, 99 S.Ct. 209, 58 L.Ed.2d 187 (1978)

(warrant to search car authorized search of suitcase found therein without need for a second warrant).

It is apparent that the Wyoming Supreme Court erred in its understanding of the Fourth Amendment's automobile exception. Given the existence of probable cause to search the vehicle generally, an *additional* measure of probable cause should not be required to search a particular container that could hold the object of the search. The Fourth Amendment does not require such calculations, and the rule of *Ross* and *Acevedo* contains no such qualifications. As this Court has made clear, probable cause to search a vehicle extends to "every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825, 102 S.Ct. at 2173.

II

If this search had been conducted incident to arrest, not requiring probable cause to search, it would have been lawful. It is peculiar to hold the search unlawful when, as here, it is based on probable cause.

A curious anomaly arises in this case from the fact that the search was based on probable cause and was not performed incident to the arrest of the driver, David Young. If he had been lawfully arrested prior to initiation of the search involved here, the Wyoming Supreme Court would have been constrained to uphold the search of Ms. Houghton's purse as incident to Young's arrest. No probable cause would have been required to search the passenger compartment or the purse. And yet, because this search was based on probable cause to search the car generally, it is struck down.

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), this Court held that when an officer makes a lawful custodial arrest of a motor vehicle occupant, he may, contemporaneously with the arrest, search the passenger compartment of the vehicle, including *any* containers found therein. Such a search is not based on the existence of probable cause to search, rather, it is the custodial arrest based on probable cause that justifies the intrusion. 453 U.S. at 460-61, 101 S.Ct. at 2864.

This straightforward rule has been applied numerous times to allow the search of a nonarrested passenger's personal effects found inside a vehicle. *See, e.g., State v. Moore*, 619 So.2d 376, 377 (Fla.Dist.Ct.App. 1993) (arrest of driver permitted search incident to arrest of passenger's closed purse on floorboard); *State v. Loftis*, 568 So.2d 121, 122 (Fla.Dist.Ct.App. 1990) (arrest of driver permitted search incident to arrest of passenger's open purse on floorboard); *People v. Mitchell*, 42 Cal.Rptr.2d 537, 539-40 (Cal.Dist.Ct.App. 1995), *cert. denied*, 517 U.S. 1192, 116 S.Ct. 1683, 134 L.Ed.2d 785 (1996) (driver's arrest permitted search incident to arrest of passenger's purse on floorboard, citing *People v. Prance*, 277 Cal.Rptr. 567 (Cal.Dist.Ct.App. 1991)); *State v. Parker*, 944 P.2d 1081, 1084-85 (Wash.Ct.App. 1997), *review granted*, 134 Wash.2d 1024, ___ P.2d ___ (Wash. May 6, 1998) (No. 66147-2) (driver's arrest permitted search incident to arrest of passenger's purse voluntarily left on seat, distinguishing *State v. Seitz*, 941 P.2d 5 (Wash.Ct.App. 1997) (driver's arrest does not justify search of passenger's purse where purse is not in car at time of search but is on passenger's person outside of car)); *People v. Bullock*, 485 N.W.2d 866, 869-70 (Mich. 1992) (arrest of *passenger* permitted search

incident to arrest of *driver's* purse left in car); *State v. Treutelaar*, No. 96-3249-CR, 1997 WL 213040 (Wis.Ct.App. May 1, 1997) (arrest of driver permitted search incident to arrest of passenger's manila envelope left on floorboard).

In cases involving lawfully stopped motor vehicles, searches of containers incident to arrest are perfectly valid although probable cause to search is absent. The same search, when based on probable cause, should not be assigned a constitutionally inferior status.

III

The Wyoming Supreme Court's holding is unworkable, illogical and will cause confusion in law enforcement and the lower courts.

At least since the days of *Carroll*, this Court has recognized the difference between searches of lawfully stopped vehicles and searches of fixed premises in terms of the constitutional protection afforded each.[5] Premises have always enjoyed more Fourth Amendment protection from warrantless searches than moving vehicles. *See, e.g., Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145 (1925) ("Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes

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[5] In *Ross*, 456 U.S. at 805-07, 102 S.Ct. at 2162-64, repeating what had been said in *Carroll*, the Court traced the history of Congressionally sanctioned warrantless searches of vessels, wagons and carriages for contraband, noting that since the time of the first Congress and adoption of the Fourth Amendment, such searches have been regarded as reasonable when based on probable cause.

no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.") It is not the case that a passenger lacks an expectation of privacy in his personal effects while traveling on a highway. Rather, it is the lawful stop of the vehicle and the existence of probable cause to search it that justifies the infringement of the passenger's privacy interest. Once probable cause is established to search the car generally, it is difficult to understand how some containers can be "more private" than others, to the point of defeating the probable cause.

Logically, treating the personal belongings of passengers in a car the same as those of visitors or guests to fixed premises does not make sense and, as a practical matter, it is unworkable. One simply does not "visit" mobile vehicles traveling on the streets and highways. People inside a moving vehicle obviously have the common purpose of getting from one place to another together by using the public thoroughfares. Guests on premises, however, may have any of a myriad of reasons for being on the premises, and they may come and go, be there or not be there, as they choose.

As this case illustrates, rules developed for visitors to fixed premises do not translate well into the automobile context. Ms. Houghton was not "visiting" the car she jointly occupied with David Young. Whatever else their reasons may have been that night for being together, their joint presence in the car demonstrated a common purpose of using the car to get from one place to another over the public roads. If Ms. Houghton had fortuitously been driving the car at the moment it was stopped instead of

Young, who would have been the "guest/passenger" and who would have been the "resident" of the premises? Is the driver always in possession of the car to the exclusion of the passengers? If the registered owner is always the "resident" of the vehicle, what if he is not present in the car when it is stopped? Is everyone in the car a mere visitor then? What if Young was alone in the car but Ms. Houghton's purse was there? Could police have searched it then? What if the syringe in this case had been seen in Ms. Houghton's shirt pocket and not Young's? Would that have created probable cause to search the car or only Ms. Houghton and her belongings? Can probable cause to search the car be developed only through the driver?

The rule announced by the court will require officers to make difficult judgments concerning which containers may be searched. The occupants of a vehicle apparently must be divided into two groups – suspects and non-suspects. Personal effects must then be allocated among the occupants to determine which ones may be searched. Police will have to develop facts through questioning the occupants, a process not likely to produce truthful information, or perhaps, any information at all. Police will have to proceed at their peril.[6]

Unfortunately, this rule will produce the very sort of mischief this Court has strenuously sought to prevent in the area of search and seizure. Quoting in part from LaFave, *"Case-By-Case Adjudication" Versus "Standardized*

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[6] It is not merely the rights of suspects that are involved. Police exposure to civil liability for guessing wrong about the extent of a person's constitutional rights is a matter worthy of this Court's consideration.

Procedures": The Robinson Dilemma, 1974 S. Ct. Rev. 127, this Court warned in *Belton*, 453 U.S. at 458, 101 S.Ct. at 2863:

> "Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' " *Id.*, at 141.

In short, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-214.

The holding of the Wyoming Supreme Court revives the confusion that marked the state of the automobile exception prior to *Ross* and *Acevedo*. To eliminate this confusion, this Court should address the problem presented and correct it.

CONCLUSION

The Wyoming Supreme Court has produced a rule that violates the plain language of this Court's pronouncements concerning the automobile exception. Based exclusively on the Fourth Amendment, this rule represents a regression to the former disarray in the law that was so troublesome to courts and law enforcement.

Given how the holding at issue conflicts with prior decisions of this Court, the straightforward nature of the facts and the brevity of the state court record, petitioner respectfully requests the Court to grant the writ of certiorari and further suggests a summary disposition on the merits.

Respectfully submitted,

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APPENDIX

Sandra HOUGHTON, Appellant (Defendant),

v.

The STATE of Wyoming, Appellee (Plaintiff).

No. 96-99.

Supreme Court of Wyoming.

April 3, 1998.

Rehearing Denied April 28, 1998.*

Sylvia L. Hackl, State Public Defender; Donna Domonkos, Appellate Counsel; Michael Dinnerstein, Director, Wyoming Defender Aid Program; T. Alan Elrod and Scott J. Olheiser, Student Interns, for Appellant (Defendant).

William U. Hill, Attorney General; Paul S. Rehurek, Deputy Attorney General; D. Michael Pauling, Senior Assistant Attorney General; Georgia L. Tibbetts, Senior Assistant Attorney General; Theodore E. Lauer, Director, Prosecution Assistance Program; and Sandra Boudreaux, Student Intern, for Appellee (Plaintiff).

Before TAYLOR, C.J., and THOMAS, MACY, GOLDEN and LEHMAN, JJ.

TAYLOR, Chief Justice.

Appellant's arrest and conviction on one count of felony possession of a controlled substance was based

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* Thomas and Golden, JJ., would have granted Rehearing.

upon evidence found in her purse during a warrantless search of an automobile in which she was a passenger. On appeal, appellant raises several challenges to her conviction, including the district court's denial of her motion to suppress the evidence found in her purse. We hold that the search of appellant's purse exceeded the reasonable scope of the search of the car, violating her Fourth Amendment rights.

Reversed and remanded.

I. ISSUES

Although appellant, Sandra Houghton (Houghton), identifies four issues on appeal, the dispositive issue is:

> Did the trial court err in denying the Appellant's Motion to Suppress Physical Evidence?

The State of Wyoming, as appellee, phrases the issue as follows:

> Did the district court err in denying appellant's pretrial motion to suppress the methamphetamine seized by law enforcement officers during a warrantless search of David Young's automobile?

II. FACTS

In the early morning hours of July 23, 1995, a Wyoming Highway Patrol Officer stopped an automobile for speeding and a faulty brake light. There were three occupants in the car – the driver, David Young (Young); his girlfriend; and Houghton. Shortly after the stop, the officer was joined by two other law enforcement officers.

While the officer was questioning Young, he noticed a syringe in Young's shirt pocket. The officer told Young he was going to get gloves out of the patrol car and would return to question Young about the syringe. While the officer went to his car, another officer kept an eye on the occupants.

Upon his return, the officer ordered Young to step out of the car and to place the syringe on the hood. When the officer asked what the syringe was for, Young responded that he used the syringe to take drugs.

At that point, the passengers were ordered out of the vehicle and were asked for identification. Houghton, identifying herself as Sandra Jones, stated she did not have identification. All occupants were then "[patted] * * * down, to see if there were any weapons or anything."[1] After the pat down yielded no weapons or contraband, the officer searched the car for drugs.

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[1] Since the pat down search of Young and the passengers failed to reveal any weapons or contraband, the propriety of the search was not addressed on appeal. However, we are concerned that the officers apparently believed that they were able to search the passengers of the vehicle absent probable cause to believe the passengers were engaged in illegal activity or any indication that the passengers posed a danger to the police officers. Here, there was no testimony which established that the driver or the occupants may be armed, and no weapons observed within the vehicle. Indeed, it appears that all the occupants of the car were cooperative throughout the stop. Thus, we perceive no reasonable basis for the pat down search of the passengers under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny, or *Perry v. State*, 927 P.2d 1158 (Wyo.1996).

While searching behind the area where the two female passengers had been seated, the officer found a closed "cloth lady's purse." He opened the purse and removed a wallet. Searching the wallet, the officer found Houghton's driver's license. The officer then told Houghton to approach the driver's side of the vehicle, where she stated that the purse was hers. Without further comment, the officer continued his search, removing a brown "wallet bag" containing drug paraphernalia, a syringe containing an estimated 60 cc's of liquid, a black wallet containing drug paraphernalia, a vial, and a syringe with approximately 10 cc's of liquid. After a field test of a small amount of the liquid from the syringe in the brown bag tested positive for methamphetamine, the officer took custody of the two containers, returned the purse to the car, and arrested Houghton for possession of a controlled substance. Young and his girlfriend were released.

Prior to trial, Houghton moved to suppress the evidence found in her purse, asserting there was no probable cause to search her belongings. Following a hearing, the district judge issued a decision letter which denied Houghton's motion to suppress the contents of her purse. Relying on *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991), the district judge found that the officer had probable cause to search the car for contraband and, therefore, any containers within the car which could hold the contraband were subject to search.

A jury found Houghton guilty of one count of felony possession of a controlled substance. After Houghton unsuccessfully moved for acquittal or a new trial, she was

sentenced to not less than two nor more than three years at the Wyoming Women's Center. This timely appeal followed.

III. STANDARD OF REVIEW

On a motion to suppress evidence, the moving party must establish by a preponderance of the evidence that her rights were violated. *Guerra v. State*, 897 P.2d 447, 452 (Wyo.1995) (*quoting Malcolm v. United States*, 332 A.2d 917, 918 (D.C.App.1975)). The constitutional touchstone of a search and/or seizure is whether the search unreasonably violated a justifiable expectation of privacy. *Saldana v. State*, 846 P.2d 604, 610-11 (Wyo.1993). "Whether a search is reasonable is to be determined from the facts and circumstances of the case in light of the 'fundamental criteria' that are found in the Fourth Amendment * * * ." *Id.* at 611. We defer to the district court's findings of fact regarding the circumstances attending the search and seizure and review those findings "pursuant to an abuse of discretion – clearly erroneous standard * * * ." *Hall v. State*, 911 P.2d 1364, 1367 (Wyo.1996). However, whether a search and seizure is unreasonable, thereby violating constitutional protections, is ultimately a question of law which warrants *de novo* review. *Id.*

IV. DISCUSSION

The issue before us is whether the personal belongings of a passenger may be searched under the "automobile exception" when probable cause exists to search the automobile, but there is no probable cause to believe

the passenger is involved in criminal activity. Houghton does not contest the probable cause to conduct the search of Young's car for drugs, but asserts that in the absence of probable cause to believe she possessed contraband, the search of her purse violated her justifiable expectation of privacy in her personal belongings. The State counters that the officers had no duty to determine probable cause as to each container within the car, and consequently, the permissible scope of the search included the search of all containers, including a passenger's purse.

The Fourth Amendment of the United States Constitution provides citizens "[t]he right * * * to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * * ."[2]. General seizures are prohibited; all searches must be supported by probable cause to believe evidence of a crime will be found.

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

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[2] Wyo. Const. art. 1, § 4 is "somewhat stronger than its federal counterpart, in that under our Wyoming Constitution it is mandatory that the search warrant be issued upon an affidavit." *Hall*, 911 P.2d at 1368. Although Houghton's claims rely on both federal and state constitutional mandate, she does not distinguish the protection afforded by the Wyoming Constitution from that of its federal counterpart. *See Gronski v. State*, 910 P.2d 561, 566 (Wyo.1996).

Hall, 911 P.2d at 1369 (*quoting Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)).

The scope of a search is defined by the probable cause upon which that search is predicated, *not* whether the search is conducted pursuant to a warrant or pursuant to a recognized exception to the warrant requirement. The Supreme Court of the United States has unequivocally held that "[t]he scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." *United States v. Ross*, 456 U.S. 798, 823, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982) (*quoted in Hunter v. State*, 704 P.2d 713, 717 (Wyo.1985), detailing the line of cases leading to the holding in *Ross*). Neither is the permissible scope of the search dependent on the place being searched, but on the object of the search.

> A warrant to search a vehicle would support a search of every part of the vehicle *that might contain the object of the search.* When a legitimate search is under way, and *when its purpose and its limits have been precisely defined,* nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

Ross, 456 U.S. at 821, 102 S.Ct. at 2171 (emphasis added). *See also Acevedo*, 500 U.S. at 580, 111 S.Ct. at 1991.

Thus, as *Ross* and *Acevedo* make clear, the permissible scope of the warrantless search of Young's car under the

automobile exception is identical to a search conducted pursuant to a warrant. The problem in this case is that while Houghton's purse could physically contain the object of the search, there was no probable cause to believe that contraband would be found in her personal belongings. Therefore, the question is, if a warrant had issued on the basis that *Young* held drugs in his car, whether the search of the personal effects of a *passenger or guest* would be within the scope of the warrant.

The United States Supreme Court has not addressed the permissibility of searching a guest's or passenger's belongings, but has considered the search of a guest's person. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In *Ybarra*, a search was conducted pursuant to a warrant to search the premises of the Aurora Tap Tavern and the person of the bartender, "Greg," based on probable cause that Greg was dealing drugs while at work. During the search, the officers conducted a pat down search of a customer in the bar, resulting in the discovery that the patron carried a quantity of drugs. The United States Supreme Court held that the pat down search was an unconstitutional violation of the patron's reasonable expectation of privacy, stating: "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra*, 444 U.S. at 91, 100 S.Ct. at 342.

> Where the standard is probable cause, *a search or seizure of a person must be supported by probable cause particularized with respect to that person.* This requirement cannot be undercut or avoided

> by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. * * * Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.

Ybarra, 444 U.S. at 91-92, 100 S.Ct. at 342. *See also United States v. Di Re*, 332 U.S. 581, 587, 68 S.Ct. 222, 225, 92 L.Ed. 210 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.").

Although the United States Supreme Court's direct concern in *Ybarra* was the impermissible intrusion on the person rather than the belongings of the patron, courts have recognized that "special concerns" are raised "when the items searched belong to * * * visitors to the premises described in the warrant." *State v. Andrews*, 201 Wis.2d 383, 549 N.W.2d 210, 212 (1996). "Such searches may become personal searches outside the scope of the premises search warrant requiring independent probable

cause" for searching the personal item at issue. *United States v. Giwa*, 831 F.2d 538, 544 (5th Cir.1987).

Jurisdictions considering the problem have reached different conclusions as to when separate probable cause is necessary to search the belongings of a visitor to the premises. Generally, three tests have evolved when analyzing this issue: the "physical proximity" or "physical possession" test; the "relationship" test; and the prodigy of the relationship test, the "notice" test. *See, generally*, 2 Wayne R. LaFave, *Search and Seizure*, § 4.10(b) (3rd ed.1996).

A substantial minority of courts have adopted the "physical proximity" test, which allows the search of objects, but prohibits the search of a person. The physical nexus between the person and the object searched determines whether the item will be considered an extension of the "person." *United States v. Teller*, 397 F.2d 494, 497 (7th Cir.), *cert. denied*, 393 U.S. 937, 89 S.Ct. 299, 21 L.Ed.2d 273 (1968) (search of woman's purse upheld when purse placed on the bed during search).[3] If the

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[3] *See also United States v. Branch*, 545 F.2d 177, 182 (D.C.Cir.1976) (search not permitted where bag being carried on shoulder of person who walked into residence while search being executed, combination of factors must be considered); *United States v. Johnson*, 475 F.2d 977, 979 (D.C.Cir.1973) (upholding search of purse placed on table in front of visitor); *People v. Coleman*, 436 Mich. 124, 461 N.W.2d 615, 619 (1990) (adopts "physical proximity" test but facts sufficient to support reasonable belief that defendant not mere visitor and existence of separate probable cause to search the purse); *State v. Wills*, 524 N.W.2d 507, 511-12 (Minn.App.1994) (upholding search of safe under both "physical proximity" and "notice" tests); *Com.*

object is close enough to be considered an extension of its owner, the search is outside the scope of the search of another's premises.

Andrews is illustrative of contemporary application of the "physical proximity" test. The Wisconsin court held that police executing a search warrant for private premises may search all items that are "plausible repositories" for objects of the search *except* those worn by or in physical possession of persons whose search is not authorized by warrant. *Andrews*, 549 N.W.2d at 218. Noting that none of the tests courts have used to determine whether a visitor's belongings are within the scope of a search have been without criticism, the Wisconsin court found that the "physical proximity" test comports with *Ybarra* by distinguishing the search of a person from a less intrusive search of belongings. The Wisconsin court also found the "physical proximity" test to be less susceptible to abuse, more easily applied, and more likely to render consistent results regarding admissibility of the evidence at trial. *Andrews*, 549 N.W.2d at 217.

While our analysis is similar to that of the Wisconsin court, we are not persuaded that the "physical proximity" approach affords sufficient recognition of reasonable expectations of privacy in the absence of individualized probable cause. Neither are we convinced that "physical proximity" provides the most efficacious balance between legitimate individual and state interests.

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v. Reese, 520 Pa. 29, 549 A.2d 909, 912 (1988); and *State v. Jackson*, 873 P.2d 1166, 1168 (Utah App.1994).

A majority of courts have rejected the "physical proximity" test, generally on the rationale that "the protective boundary established by requiring a search warrant should encompass those extensions of a person which he reasonably seeks to preserve as private, regardless of where he may be." *United States v. Micheli*, 487 F.2d 429, 432 (1st Cir.1973). In *Micheli*, the court further opined:

> A focus on actual physical possession is too narrow, however, in that it would leave vulnerable many personal effects, such as wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage. The Fourth Amendment's basic interest in protecting privacy * * * and avoiding unreasonable governmental intrusions * * * is hardly furthered by making its applicability hinge upon whether the individual happens to be holding or wearing his personal belongings after he chances into a place where a search is underway. The rudest of governmental intrusions into someone's private domain may occur by way of a search of a personal belonging which had been entrusted to a nearby hook or shelf. The practical result of such a rule may be to encourage the government to obtain search warrants for places frequented by suspicious individuals, such as infamous bars, then lie in wait for those individuals to enter and make themselves comfortable.

Id. at 431.

Based on this reasoning, courts have rejected the "physical proximity" test in favor of either a "relationship" test, a "notice" test, or a combination of the two. The "relationship" test looks to the nexus between the

person, the effects searched, and the premises. Under this approach, if the items belong to someone who is more than a "visitor" or the effects have a special relationship to the place, then they are part of the premises which may be searched. If not, the personal effects are outside the scope of a premises warrant. *United States v. Young*, 909 F.2d 442, 445 (11th Cir.1990), *cert. denied*, 502 U.S. 825, 112 S.Ct. 90, 116 L.Ed.2d 62 (1991); *Giwa*, 831 F.2d at 545; *Micheli*, 487 F.2d at 430-31.

The "relationship" approach has not been without its critics. *See State v. Jackson*, 873 P.2d 1166, 1168 (Utah App.1994) and *Andrews*, 549 N.W.2d at 217. In *State v. Nabarro*, 55 Haw. 583, 525 P.2d 573, 577 (1974), the shortcomings of the "relationship" approach were identified as follows:

> [P]olice cannot realistically be expected to avoid searching the property of a mere visitor to the premises unless they are aware of its ownership. Absent a requirement of such awareness, the effective execution of a warrant to search a place would be impossible since the police could never be sure that a plausible repository for items named in the warrant belongs to a resident, and hence is searchable, or to a non-resident, and hence is not searchable. Because of this, without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant.

We agree that the "relationship" test used by several courts provides an unworkable and impractical analysis

given the time constraints attendant upon most searches. Even the most particular description of "the place to be searched" will not avoid the uncertainty of the ownership of "plausible repositories" in some circumstances. The holding in *United States v. Gottschalk*, 915 F.2d 1459, 1461 (10th Cir.1990) echoes the difficulties inherent in the real-life application of the "relationship" test:

> [Defendant] urges that we should adopt a strict limitation on the scope of a "premises" search warrant to exclude any vehicles other than those actually owned or controlled by the owner of the premises. The difficulty with such a limitation, as formulated, is demonstrated by this case. The circumstances surrounding the search of the Cadillac were such that at the time the officers decided to proceed it would have been difficult to determine with precision whether the car was in fact controlled by [the person identified in the warrant] or whether [defendant] retained full control and dominion. * * * A legal limitation based on such a difficult and uncertain factual determination is neither practical nor desirable where it must be applied in cases such as this, late at night, in the course of considerable surrounding police activity, without the benefit of full factual inquiry, and by non-legally trained personnel.

The Tenth Circuit Court of Appeals' solution applied a "notice" approach:

> We believe the better rule in these circumstances is to define the scope of the warrant to include those automobiles either actually owned or under the control and dominion of the premises owner, or, alternatively, *those vehicles which*

> *appear, based on objectively reasonable indicia present at the time of the search, to be so controlled. Thus where the officers act reasonably in assuming that the automobile is under the control of the premises owner, it is included in the warrant.*

Id. at 1461 (emphasis added). That analysis supported our decision in *Guerra*, 897 P.2d at 459, upholding the admission of evidence seized from two vehicles adjacent to the premises of the defendant.

We extend that reasoning here and adopt the "notice" test in circumstances where we must determine the reasonableness of the search of a visitor's personal effects while executing a premises search. In Wyoming, " 'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate government interests.' " *Jones v. State*, 902 P.2d 686, 692 (Wyo.1995) (*quoting Texas v. Brown*, 460 U.S. 730, 737-39, 103 S.Ct. 1535, 1541-42, 75 L.Ed.2d 502 (1983)). *See also Collins v. State*, 854 P.2d 688, 692 (Wyo.1993) and *Saldana*, 846 P.2d at 610-11 (holding that reasonableness of seizure of a person is determined by balancing the nature of the intrusion against the governmental interest). After reviewing the approaches used by other courts, we are persuaded that the "notice" test affords the best balance between the legitimate interests of both the individual and law enforcement.

Under the "notice" test, police officers may assume that all containers on the premises may be searched unless they know or should know that the containers belong to someone not contemplated in the warrant or amenable to search on the basis of probable cause. The

practical parameters applied under a "notice" approach are that police may search the visitor's belongings on the premises under a proper assumption that all personal property belongs to the resident if:

> 1. The visitor's personal items might serve as a plausible repository of the object of the search, unless the officer knows the property belongs to another; and
>
> 2. If the officer knows the property belongs to the visitor, they may not rely on the authority conferred by the warrant unless;
>
> 3. Someone within the premises had the opportunity to conceal the contraband within the personal effects of the visitor immediately prior to the execution of the warrant.

State v. Thomas, 818 S.W.2d 350, 359 (Tenn.Crim.App.1991) (search of visitor's purse beyond scope of warrant to search premises of male suspect because not reasonable to believe suspect owned woman's pocketbook).[4] The "notice" test provides law enforcement officers clear

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[4] *See also Waters v. State*, 924 P.2d 437, 440 (Alaska App.1996) (absent a clear notice that the purse belonged to female visitor rather than female identified in warrant, search upheld); *People v. McCabe*, 144 Cal.App.3d 827, 192 Cal.Rptr. 635, 636-37 (1983); *Wright v. State*, 221 Ga.App. 559, 472 S.E.2d 128, 129 (1996) (jacket could have belonged to anyone in home, search upheld, distinguishing *Childers v. State*, 158 Ga.App. 613, 281 S.E.2d 349 (1981) where officers should have known that purse belonged to visitor because she was only female on premises); *Nabarro*, 525 P.2d at 576-78; and *State v. Lambert*, 238 Kan. 444, 710 P.2d 693, 697-98 (1985).

guidelines, and can be quickly implemented in an emergency situation, but does not unnecessarily abrogate individualized Fourth Amendment protection merely because a jacket is removed or a purse is placed on a floor or table. Moreover, the "notice" approach most closely adheres to our analysis in previous cases. *See Gronski v. State*, 910 P.2d 561, 564 (Wyo.1996) (warrantless search of duffel bag in trunk of car held proper because probable cause existed to believe the duffel bag contained marijuana) and *Hunter*, 704 P.2d at 717 (warrantless search defined by the object and the places in which there is probable cause to believe it may be found).[5]

Applying the "notice" test to the facts as related by the arresting officer, we find that there was no probable cause to search Houghton's purse. The officer testified that there were two women passengers and a male driver in the car when it was stopped. The officer searched the car based on his belief that the syringe indicated that *the male driver* may have contraband in his car. At the time of the search, the officer had no knowledge which indicated Houghton also possessed drugs. The purse was found behind the area where Houghton was seated until ordered out of the vehicle. The officer further acknowledged that it was a "lady's purse" and that "men do not carry purses * * * ."

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[5] The "automatic companion rule" adopted in our recent holding in *Perry*, 927 P.2d 1158 is premised solely on the "justifiable concern for officer safety in the context of a lawful arrest of Perry, Jr. * * * ." *Id.* at 1163. It is, therefore, not applicable in Houghton's case as there was no arrest prior to the search and no reasonable belief that the purse concealed any weapon which would endanger the officers.

At that point, the officer knew, or should have known, that the purse was not the possession or in the control of the driver, but was the personal effect of one of the non-suspect passengers. Thus, under the "notice" test, the purse was not within the scope of the search of the automobile unless the officer had some reason to believe that "someone within the premises has had the opportunity to conceal the contraband within the personal effects of the visitor immediately prior to the execution of the * * * [search]." *Thomas*, 818 S.W.2d at 359.

Since part of Houghton's defense was that one of the "wallets" was not hers, the State went to great lengths to show there was no opportunity for the occupants of the car to place contraband in Houghton's purse immediately prior to or during the stop. The officer testified that he used his lights to illuminate the inside of the car at all times, and that there were no "unusual movements or sudden movements within the vehicle itself." He also testified that the occupants were constantly under his observation or that of another officer. The officer's testimony clearly established that there was no reason to believe the object of the search was placed in the purse prior to the stop, no probable cause to believe that either woman was carrying drugs, and no reason to believe that the purse belonged to Young. Consequently, the closed purse was not within the scope of the warrantless search for the contraband in the possession or control of the driver. Since the search of the purse was not based on probable cause or within the scope of the search of Young's car, the district court erred in denying

Houghton's motion to suppress the evidence found therein.[6]

The State does not rely on any of the tests described above, but urges that we follow the recent Colorado Supreme Court ruling in *People v. McMillon*, 892 P.2d 879 (Colo.1995). There, the female driver and McMillon, the female passenger, were asked to step outside a vehicle which had been stopped for equipment violations. While questioning the driver, the deputy observed a syringe "between the driver's seat and the console between the seats." *Id.* at 880. The deputy then arrested the driver and proceeded to conduct an "inventory search incident to the driver's arrest." *Id.* During the search of the vehicle, the deputy opened McMillon's purse which she had left on the passenger's seat and discovered controlled substances within. *Id.* at 880-81.

In support of its conclusion that the ownership of the purse was irrelevant under the automobile exception, the Colorado Supreme Court offered this cursory analysis:

> We further conclude that neither *Acevedo* [500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619] nor *Ross* [456 U.S. 798, 102 S.Ct. 2157] requires a separate determination of probable cause for each closed container found within a vehicle.

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[6] It is uncontested that there was no consent to search the purse, and no arrest other than that based on the contraband found within the purse. Neither was there reason to believe that the purse contained any weapon. Therefore, no alternative basis on which to uphold the search of Houghton's purse need be discussed.

> Accordingly, because Deputy Hicks had probable cause to search the vehicle under the automobile exception, he also had probable cause to lawfully search McMillon's purse located within the passenger compartment of the automobile, irrespective of whether Deputy Hicks knew or should have known that the purse belonged to McMillon.

McMillon, 892 P.2d at 883. Although the facts of *McMillon* may be distinguished from those before us by the gender and arrest of the suspect, the Colorado Supreme Court's analysis does not so much as nod to the articulation of the individual nature of Fourth Amendment guarantees found in *Ybarra*, 444 U.S. 85, 100 S.Ct. 338. Neither does the analysis attempt to rationalize the governmental intrusion against a reasonable expectation that one's closed purse or wallet will not be searched in the absence of probable cause that it may contain evidence of a crime.[7] Indeed, *McMillon*'s holding ostensibly allows officers to order non-suspect passengers to leave their

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[7] Neither *Love v. State*, 254 Ga. 697, 334 S.E.2d 173 (1985) nor *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992) contain facts similar to the case before us. In *Love*, 334 S.E.2d at 174, the court held that the warrantless search of defendant's companion's purse was authorized. Defendant was convicted of possession of drugs, largely on evidence furnished by his female companion who had physical possession of the contraband at the time of arrest and who had given consent to search her boyfriend's car where her purse was located. *Id.* In *Vermuele*, 492 N.W.2d at 30-32, the court held that the warrantless search of a passenger's wallet was valid because probable cause existed to search the vehicle for contraband. However, in that case, the passenger was searched and drugs were found on his person, leading to his arrest prior to the search of the wallet. *Id.* at 29.

belongings in a car while they must exit, so that the car and its contents may be searched.

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment * * * disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971). "The purpose of the Fourth Amendment's requirement of reasonableness 'is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted – even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable." ' " *Richards v. Wisconsin*, 520 U.S. 385, ___ n. 4, 117 S.Ct. 1416, 1421 n. 4, 137 L.Ed.2d 615 (1997) (*quoting Minnesota v. Dickerson*, 508 U.S. 366, 380, 113 S.Ct. 2130, 2139, 124 L.Ed.2d 334 (1993), Scalia, J., concurring). We cannot agree that the automobile exception removes from judicial review *all* searches of *all* containers physically capable of containing the object of the search. To so rule would provide a wholesale surrender of Fourth Amendment protection upon entering an automobile.

V. CONCLUSION

Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the

opportunity to conceal the contraband within the personal effect to avoid detection. Here, the officers knew or should have known that the purse did not belong to the driver, but to one of the passengers. Since there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse, the search was unreasonable and in violation of the Fourth Amendment right to be free from such governmental intrusion. We, therefore, reverse the district court's denial of Houghton's motion to suppress and remand this case for disposition in accord with this opinion.

GOLDEN, Justice, dissenting, with whom THOMAS, Justice, joins.

I respectfully dissent. A number of points are now settled in Fourth Amendment jurisprudence:

1. The touchstone of the United States Supreme Court's Fourth Amendment analysis is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878-79, 20 L.Ed.2d 889 (1968)).

2. Reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 109, 98 S.Ct. at 332 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975)).

3. It is reasonable for a law officer as a matter of course to order the driver of a lawfully stopped motor vehicle to exit his vehicle. *Id.* at 110-11, 98 S.Ct. at 333.

4. It is reasonable for a law officer as a matter of course to order the passengers of a lawfully stopped motor vehicle to exit the vehicle. *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

5. On a theory of probable cause to search a motor vehicle, the automobile exception to the warrant requirement permits a search of the entire vehicle and anything in it that could contain the items being searched for. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

6. "The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ross*, 456 U.S. at 824, 102 S.Ct. at 2172.

7. In *Ross*, the United States Supreme Court has an opinion in automobile search cases that provides "specific guidance to police and courts in this recurring situation." *Id.* at 826, 102 S.Ct. at 2173 (Powell, J., concurring) (quoting *Robbins v. California*, 453 U.S. 420, 435, 101 S.Ct. 2841, 2850, 69 L.Ed.2d 744 (1981) (Powell, J., concurring in judgment)).

8. Fourth Amendment doctrine is primarily intended to regulate the police in their day-to-day activities and, therefore, should be expressed in terms that are readily

applicable by the law officer in the context of his or her law enforcement activities. *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981). "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application in the field.' " *Id.* (quoting from LaFave, "Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP.CT. REV. 127, 141).

9. "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions . . . between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *Ross*, 456 U.S. at 821, 102 S.Ct. at 2171.

Against this backdrop of settled principles, the majority would create an "ifs, ands, and buts" qualifier in the case of the female passenger's purse which is left behind in the male driver's automobile when all of the automobile's occupants have exited the automobile in response to the law officer's lawful request. The majority now requires the law officer to establish an independent probable cause with respect to the purse left behind in the automobile's passenger compartment. In my judgment, the passenger's act of leaving her purse behind as she exited the automobile demonstrates an absence of a reasonable expectation of privacy in that purse. In other words, by leaving the purse behind, the passenger has

taken no precaution in order to maintain her privacy in that particular container. *See Dean v. State*, 865 P.2d 601, 613 (Wyo.1993) (stating factors to consider in determining whether an individual possesses a reasonable expectation of privacy).

The object of the law officer's lawful search in this case was a controlled substance which could have been secreted in a small container, such as the purse which the passenger Houghton had left behind in the passenger compartment. Common sense tells us that the transfer of small containers of controlled substances between an automobile's occupants can occur swiftly, silently, effortlessly, and without detection by even the keenest observer. As for me, the words of those who have carefully studied the problem have force, "it seems absurd to say that the occupants can take the narcotics out of the glove compartment and stuff them in their pockets, and drive happily away after the vehicle has been fruitlessly searched." 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.2(e) at 508 (3d ed.1996) (quoting from Model Code of PreArraignment Procedure § SS 260.3(2) at 551-52 (1975)).

I would uphold the district court's denial of Houghton's motion to suppress the incriminating evidence found in her purse. Measured by the United States Supreme Court's Fourth Amendment doctrine, the law officer here acted reasonably.

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1998

SANDRA HOUGHTON, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).	)	No. 96-99

ORDER DENYING PETITION FOR REHEARING

(Filed Apr. 28, 1998)

Appellee, the State of Wyoming, having filed with this Court its Petition for Rehearing together with Brief in Support of Petition for Rehearing, and the Court having reviewed the file and record of the Court, it is

ORDERED that Appellee's Petition for Rehearing be and it hereby is denied.

DATED this 28th day of April, 1998.

FOR THE COURT:**

/s/ **William A. Taylor**
WILLIAM A. TAYLOR
CHIEF JUSTICE

** Justices Thomas and Golden would have granted the Petition for Rehearing.